

IN THE SUPREME COURT OF THE STATE OF DELAWARE

EMMANUEL RODGERS,	§	
	§	No. 688, 2010
Defendant Below,	§	
Appellant,	§	Court Below—Superior Court
	§	of the State of Delaware in and
v.	§	for New Castle County
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	Cr. ID No. 0409003152
Appellee.	§	

Submitted: February 25, 2011

Decided: May 3, 2011

Before **STEELE**, Chief Justice, **JACOBS** and **RIDGELY**, Justices.

**ORDER**

This 3<sup>rd</sup> day of May 2011, upon consideration of the briefs on appeal and the Superior Court record, it appears to the Court that:

(1) The appellant, Emmanuel Rodgers, filed an appeal from the Superior Court's October 5, 2010 denial of his motion for postconviction relief as procedurally barred pursuant to Superior Court Criminal Rule 61(i) ("Rule 61(i)").<sup>1</sup> We have determined that there is no merit to the appeal and affirm the judgment of the Superior Court.

(2) On September 20, 2004, Rodgers was indicted on eight counts of Rape in the Second Degree. The charges arose from allegations that 28-year old

---

<sup>1</sup> See Del. Super. Ct. Crim. R. 61(i) (listing procedural bars to relief).

Rodgers had “intentionally engage[d] in sexual intercourse with [the alleged victim], without her consent.” Rodgers’ alleged victim was a 14-year old girl. In Delaware, a person can be charged with Rape in the Second Degree, *i.e.*, intentional intercourse without consent, when, as in Rodgers’ case, the alleged victim is a child who has not yet reached his or her sixteenth birthday and the person is four years older than the child.<sup>2</sup>

(3) The record reflects that, at some point during the trial, the State entered a *nolle prosequi* on five of the eight counts charged. As a result, only three counts of Rape in the Second Degree went to the jury. The record also reflects that the jury was instructed on Rape in the Fourth Degree as a lesser-included offense of Rape in the Second Degree. In the end, the jury found Rodgers guilty, as charged, of three counts of Rape in the Second Degree.

(4) After the May 5, 2005 jury verdict, the State moved to have the charges and convictions reduced to Rape in the Fourth Degree. In Delaware, a person is guilty of Rape in the Fourth Degree when the person engages in sexual intercourse with another person who has not yet reached his or her sixteenth birthday.<sup>3</sup> Rodgers did not oppose the State’s motion, and the motion was subsequently granted by the Superior Court.

---

<sup>2</sup> Del. Code Ann. tit. 11, § 772(a)(1) (2007); Del. Code Ann. tit. 11, § 761(k) (Supp. 2010).

<sup>3</sup> Del. Code Ann. tit. 11, § 770 (2007).

(5) After a presentence investigation, the Superior Court granted the State's habitual offender motion and sentenced Rodgers on three counts of Rape in the Fourth Degree to forty-six years at Level V suspended after forty-five years minimum mandatory for probation. On direct appeal, this Court affirmed Rodger's convictions and sentence pursuant to Supreme Court Rule 26(c).<sup>4</sup>

(6) On April 23, 2008, Rodgers filed a motion for postconviction relief. Rodgers alleged that (i) he was denied due process and the effective assistance of counsel when the State was permitted to argue at trial that he was guilty of Rape in the Second Degree based on the alleged victim's age; (ii) he was denied due process and the effective assistance of counsel when the Superior Court granted without objection the State's motion to reduce the convictions to Rape in the Fourth Degree; and (iii) his defense counsel was ineffective when he failed to argue that Rodgers was ineligible for habitual offender sentencing.

(7) Rodgers' motion was referred to a Superior Court Commissioner for a report and recommendation. On August 27, 2009, after consideration of the motion, the State's response, defense counsel's affidavit and Rodgers' response, the Commissioner filed her report recommending that the motion should be procedurally barred as untimely pursuant to Rule 61(i)(1). The Commissioner also

---

<sup>4</sup> *Rodgers v. State*, 2006 WL 568572 (Del. Supr.).

recommended that Rodgers' claims should be denied as procedurally barred pursuant to Rule 61(i)(3) and as without merit.

(8) Rodgers filed objections to the report, complaining that the Commissioner did not rule on the merit of his claims. By order dated October 5, 2010, the Superior Court, upon *de novo* review, adopted the Commissioner's report and recommendation and denied Rodgers' motion for postconviction relief. This appeal followed.

(9) When reviewing the Superior Court's denial of postconviction relief, this Court first must consider the procedural requirements of Rule 61 before addressing any substantive issues.<sup>5</sup> Rule 61(i)(1) bars a motion for postconviction relief that is not filed within one year;<sup>6</sup> Rule 61(i)(3) bars consideration of any claim that could have been raised in the prior proceedings but was not.<sup>7</sup> As to both, Rule 61(i)(5) provides that the bars shall not apply to a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability or fairness of the proceedings leading to the judgment of conviction.<sup>8</sup> Moreover, a Sixth Amendment claim of ineffective assistance of counsel is also governed by *Strickland v. Washington*,

---

<sup>5</sup> *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

<sup>6</sup> Del. Super. Ct. Crim. R. 61(i)(1)

<sup>7</sup> Del. Super. Ct. Crim. R. 61(i)(3)

<sup>8</sup> Del. Super. Ct. Crim. R. 61(i)(5).

which requires that a movant must show that counsel's representation fell below an objective standard of reasonableness and was prejudicial.<sup>9</sup>

(10) In his opening brief on appeal, Rodgers argues that the one-year filing deadline should be tolled as to his postconviction motion on the basis that, prior to the deadline and twice thereafter, he requested an extension of time to file the motion, and that his requests were ignored by the Superior Court.<sup>10</sup> Rodgers' argument is unavailing. Superior Court Criminal Rule 45(b) prohibits the court from extending the time for taking any action Rule 61(i).<sup>11</sup>

(11) Next, Rodgers argues that his due process claims should not have been barred under Rule 61(i)(3) because it was defense counsel's ineffectiveness that prevented the claims from being raised on direct appeal. Again, Rodgers' argument is unavailing because, simply put, his due process claims are without merit.<sup>12</sup> Rodgers was not charged with "forcible" rape, as he now argues. Rather, 28-year old Rodgers was charged with having intentional intercourse with a 14-year old girl who, by statute, was deemed unable to consent to the sexual act(s). In the final analysis, because the due process claims are without merit, Rodgers

---

<sup>9</sup> *Strickland v. Washington*, 466 U.S. 668, 687-88, 692 (1984).

<sup>10</sup> Rodgers' judgment of conviction became final on March 23, 2006, upon the issuance of this Court's mandate on direct appeal. Del. Super. Ct. Crim. R. 61(m)(2).

<sup>11</sup> Del. Super. Ct. Crim. R. 45(b).

<sup>12</sup> Also, Rodgers was given the opportunity, but chose not, to submit points that he wanted the Court to consider. *See Rodgers v. State*, 2006 WL 568572 (Del. Supr.) (affirming Superior Court judgment pursuant to Del. Supr. Ct. R. 26(c)).

cannot support a claim that he was prejudiced as a result of any alleged related ineffectiveness of his counsel with respect to those claims.

(12) Rodgers' final argument, that his defense counsel was ineffective for not challenging his eligibility for habitual offender sentencing, is also without merit and thus subject to the procedural bars of Rule 61. As the Superior Court concluded, the record reflects that Rodgers was eligible for habitual offender sentencing. Rodgers' claim to the contrary is without merit.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Henry duPont Ridgely  
Justice